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In the Supreme Court of the United States

OCTOBER TERM, 1976

PHILLIP JEROME LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 17–20) is reported at 539 F.2d 612.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1976. The petition for a writ of certiorari was filed on August 9, 1976, and was granted on January 10, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant may be retried after the court, at the defendant's request, dismissed the information during trial on the ground that it was defective on its face.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

STATEMENT

In an information filed on February 6, 1974, petitioner was charged with theft, in violation of the Assimilative Crimes Act (18 U.S.C. 13) and an Indiana state statute (A. 4). On May 24, 1974, the district court appointed Donald Swanson as petitioner's counsel and set July 16, 1974 (approximately two months later) as the trial date (A. 2).[1] Petitioner waived his right to be tried by a jury (A. 3), and a bench trial commenced as previously scheduled (A. 7).

The prosecutor made his opening remarks outlining the government's evidence (A. 7), and the district judge then invited defense counsel to make an opening statement. Mr. Swanson orally moved to dismiss the information on the ground that it failed to allege that petitioner committed the theft knowingly and intending permanently to deprive the victim of his property (A. 8–9). The district court remarked that counsel could have made this motion before the trial commenced, stating (A. 8):

> Well, I will consider it, but you certainly were in the case before this morning. It is difficult to deal with a motion to dismiss if you raise any technical questions, and you don't give me the opportunity in advance of trial to research them. So I will hear you, but you have that problem.

[1] Swanson replaced another attorney, who was permitted to withdraw (A. 2).

The court observed that because it had "no opportunity to study this at all" it would deny the motion "at this time, but at my first opportunity I will check [the state case cited in support of the motion] and give [it such] consideration as appears to be warranted" (A. 9).

The court asked defense counsel whether he had "anything further by way of opening statement" (A. 9). Mr. Swanson made a brief opening statement. He did not object to proceeding with the trial (*ibid.*).

The prosecution then presented its case. Petitioner stipulated that the theft occurred, if at all, in the United States Post Office in Fort Wayne, Indiana, which was under the exclusive jurisdiction of the federal government (A. 10). The prosecution presented the testimony of two witnesses: Vance Travis, a security guard at the Post Office, and Charles Bilskie, the victim of the crime. Their testimony (Tr. 17–62) showed that Bilskie, who was 63 years old and blind, operated a news stand and candy concession in the Post Office lobby. On December 21, 1973, after Bilskie had placed his two wallets on a counter behind his stand, Travis saw petitioner go behind the counter and take the wallets. Travis shouted at petitioner, who tried to escape but was apprehended.

After a short recess petitioner moved for a judgment of acquittal, arguing that the prosecution had failed to prove criminal intent or that petitioner had possession of the wallets (A. 11–12). The court denied this motion on the understanding that its decision did not apply to petitioner's earlier motion concerning the adequacy of the charge, upon which the court had reserved decision (*ibid.*).

Petitioner rested without presenting any evidence (A. 13). The court then returned to the defense motions. As to the sufficiency of the evidence, the court told Mr. Swanson (*ibid.*): "Your motion addressed to the Government's proof borders on being frivolous. Your client has been proven beyond any reasonable doubt in the world, there is no question about his guilt; none whatsoever."

The court did not, however, render a formal verdict of guilty. It instead took up the motion to dismiss the information for failure to state all of the elements of the offense. The court granted this motion, holding that the information was improperly drawn because it did not charge that petitioner took the wallets knowingly and with the intent permanently to deprive the owner of his property (A. 13–14).

On September 25, 1974, petitioner was indicted for the theft of the wallets. The indictment alleged that petitioner committed the theft knowingly, with the intent to deprive Bilskie of his property. At a bench trial on June 23, 1975, the prosecution introduced the same evidence that had been produced in the first

trial. The defense again presented no evidence. The court rendered a verdict of guilty (Tr. 89–90).

The court of appeals rejected petitioner's argument that the second trial was barred by the Double Jeopardy Clause (A. 17–20). After concluding that the Clause should not be applied in a mechanical fashion (A. 19), the court went on (A. 20):

> In the case at bar, the motion of dismissal was made by the defendant on the day of trial. The dismissal was granted after the evidence was heard, but before any finding was made of guilt or innocence. It was not based on evidence adduced at trial, but rather on the failure of the information to state an essential element of the offense—in short, because of a jurisdictional defect. Significantly, the defendant knowing that the court had taken his motion to dismiss under advisement did not object to going forward with the trial. Under these circumstances, we conclude that the double jeopardy clause did not bar his retrial.

SUMMARY OF ARGUMENT

1. The Double Jeopardy Clause does not require society to marshal its resources to guarantee every defendant a single error-free proceeding, on pain of inability, when error arises, to complete the prosecution of those accused of crime. It is settled, for instance, that when an accused has had an opportunity to receive a verdict, has been convicted, and the conviction has been reversed on appeal because of error in the indictment, a second trial does not violate the

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Double Jeopardy Clause. Also, when during the course of a trial an accused willingly surrenders his right to receive the verdict of the factfinder by asking for a mistrial, this election removes any barrier to a second trial. And even when an ongoing trial is terminated over the defendant's objection, a new trial still may be held if there was manifest necessity to override the defendant's preference for the first tribunal. Each of these strands of double jeopardy law supports the propriety of petitioner's second trial.

The only factor that differentiates cases in which a conviction is reversed on appeal (and in which a second trial is indisputably allowed by double jeopardy principles) from cases in which an ongoing trial is aborted is that a mid-trial termination may deprive the defendant of his valued right to receive the verdict of the factfinder then sitting. All of the other considerations—the continuing state of anxiety, the expense of a second trial, and so on—are the same whether the second trial follows a reversal on appeal or a mid-trial termination. It follows logically that the rules governing retrial after a mid-trial termination should not differ from those allowing retrial after reversal of a conviction, except to the extent necessary to vindicate this single additional interest of protecting the defendant's right to receive a verdict at the first trial.

But when the defendant seeks the pre-verdict termination of his trial, the granting of his request does not "deprive" him of the right to receive the factfinder's verdict; to the contrary, the mid-trial termination gives to the accused an outcome he apparently values more highly than receiving the factfinder's verdict. After all, a defendant who desires to receive the factfinder's verdict could do so by submitting his case to the factfinder and preserving his legal issues for a ruling after trial.[2] Accordingly, logic and policy dictate that a request by the accused to terminate an ongoing trial should ordinarily remove any double jeopardy bar to a second prosecution. *United States* v. *Dinitz*, 424 U.S. 600.

It would be strange if the only way for a trial judge to safeguard the public's interest in fair trials designed to end in just judgments were to deny seemingly meritorious requests to terminate ongoing trials. Yet if the district court (erroneously) had denied petitioner's motion to dismiss the information, the trial would have gone to verdict, the conviction would have been set aside (either by the district court or on appeal), and a second trial could have been held free of any serious contention that the Double Jeopardy Clause had been violated. Why should petitioner acquire immunity from prosecution because the district court, following a procedure that was agreeable to petitioner, correctly granted his motion, thereby sparing him the trauma of a pronouncement of guilt and

[2] In the present case, for instance, petitioner could have asked that a verdict be returned and then moved for an arrest of judgment pursuant to Fed. R. Crim. P. 34. Such a procedure would have protected fully his right not to be convicted upon a defective information.

the expense and delay that might have been necessary to have that verdict set aside?

2. Although petitioner agrees with much of this analysis (Br. 22 n. 35), he argues that this case should be assessed by different standards because the termination of the trial did not occur until after all the evidence was taken. But any hardship petitioner may have experienced during the taking of evidence in the first trial was caused, in substantial measure, by his counsel's delay in making the motion to dismiss the information. Despite the fact that counsel had almost two months in which to prepare and file written motions before trial, counsel's first objection to the sufficiency of the information came in an oral motion made after trial had commenced and the prosecutor had made his opening statement. Although this mid-trial motion was made before the technical "attachment" of jeopardy, it came too late to allow either the judge or the prosecutor any opportunity to research before trial the state cases upon which petitioner relied.

The district court therefore acted reasonably in proceeding with the trial until a convenient recess provided time to inquire further. If petitioner were dissatisfied with the court's decision to begin taking evidence before ruling on the motion to dismiss, he could have objected or asked for a continuance. He did neither, and his failure to do so must be taken as an acquiescence in the hearing of evidence, at least until the first regular recess during the trial. Similarly, when the judge was ready to rule on the motion

to dismiss, petitioner did not ask that the ruling be reserved until after verdict (doubtless because the judge had prefaced his ruling by stating (A. 13) that petitioner was guilty "beyond any reasonable doubt in the world"). Under the circumstances, any hardship caused by the decision to hear evidence must be "subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. 684, 689.

ARGUMENT

PETITIONER'S SECOND TRIAL DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

A. INTRODUCTION

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense." *North Carolina* v. *Pearce,* 395 U.S. 711, 717. Petitioner's first trial was aborted, at his request, before a verdict of guilt or innocence was rendered by the factfinder. This case therefore does not present any question concerning a second prosecution after a conviction or an acquittal by the factfinder.[3] It does, however, pre-

[3] Other cases now before the Court present questions concerning the holding of second trials following a conviction for a closely related offense (*Jeffers* v. *United States,* No. 75–1805, argued March 21, 1977) and following a legally erroneous "acquittal" by the judge after the jury was unable to reach a verdict (*United States* v. *Martin Linen Supply Co.,* No. 76–120, argued

sent the question whether petitioner's second trial for the same crime was proper.

The prohibition against multiple trials for the same offense is based upon the special interests protected by the Clause.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States,* 355 U.S. 184, 187–188, quoted in *Serfass* v. *United States,* 420 U.S. 377, 387–388. See also *Breed* v. *Jones,* 421 U.S. 519; *United States* v. *Jorn,* 400 U.S. 470, 479 (plurality opinion).

Because of the special rules of finality created by the Clause, the prosecution may not retry a defendant who has been acquitted, on the facts, by the finder of facts, whether or not the instructions or legal principles underlying the acquittal were erroneous.[4]

February 23, 1977). We have furnished to counsel for petitioner copies of our briefs in *Jeffers* and *Martin Linen.*

[4] A second trial also is barred when the prosecution, seeing that things are going badly, seeks "another, more favorable opportunity to convict the accused" (*Gori* v. *United States,* 367 U.S. 364, 369) or, more generally, when the government seeks to "do better a second time" with a more favorably disposed factfinder (*Brock* v. *North Carolina,* 344 U.S. 424, 429 (Frankfurter, J., concurring)).

United States v. *Wilson,* 420 U.S. 332, 347–348; *United States* v. *Jenkins,* 420 U.S. 358 (decision on the general issue of guilt or innocence by judge acting as factfinder in bench trial); *Fong Foo* v. *United States,* 369 U.S. 141 (court instructed the jury to return a verdict of not guilty in the middle of the prosecution's case, and the jury did so); *Kepner* v. *United States,* 195 U.S. 100. But only a "verdict of acquittal at the hands of the jury [or judge in a bench trial]" (*Forman* v. *United States,* 361 U.S. 416, 426) is an *absolute* bar to a second trial. In any other event, whether a second trial may be held depends upon a careful balancing of the defendant's interest in avoiding repetitious trials against the public's interest in "fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. 684, 689.

With the exception of the principle that a verdict of acquittal by the factfinder is a complete bar to reprosecution, the Court has eschewed the application of any "mechanical formula" or "rigid rules." *Illinois* v. *Somerville,* 410 U.S. 458, 462–463, 467. A rule that a second trial for the same offense invariably violates the Double Jeopardy Clause "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [T]he purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." *Wade* v. *Hunter, supra,* 336 U.S. at 688–689. As Mr. Justice Harlan

explained in *United States* v. *Jorn, supra,* 400 U.S. at 483–484, "it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. * * * The determination to allow reprosecution in [some] circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error."

The most important value that may be disserved by a mid-trial termination is the right of the accused "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn, supra,* 400 U.S. at 486. When an accused has had an opportunity to receive that verdict and has been convicted, a second trial does not violate the Double Jeopardy Clause even though a legal error may have prevented the factfinder from acquitting. See *Forman* v. *United States, supra; United States* v. *Ball,* 163 U.S. 662; *United States* v. *Tateo,* 377 U.S. 463. This principle has been carried so far as to permit a second trial even though the evidence at the first trial was insufficient to allow the jury to convict. *Forman* v. *United*

States, supra, 361 U.S. at 424–425; *Bryan* v. *United States,* 338 U.S. 552, 559–560.[5]

Moreover, when during the course of a trial an accused willingly surrenders his right to receive the verdict of the factfinder, this choice removes any barrier to a second trial, unless the election was forced by judicial or prosecutorial overreaching. *United States* v. *Dinitz,* 424 U.S. 600. Finally, even if an ongoing trial is terminated over the defendant's objection, thereby depriving him of his "valued right" to receive the factfinder's verdict (*Wade* v. *Hunter, supra,* 336 U.S. at 689), a new trial still may be held if there was manifest necessity to override the defendant's preference for the first tribunal. *United States* v. *Perez,* 9 Wheat. 579; *Illinois* v. *Somerville, supra.*

Each of these strands of double jeopardy law supports the propriety of petitioner's second trial. Petitioner was convicted by the factfinder at the first trial in all but matters of form; the district judge stated that petitioner was guilty "beyond any reasonable doubt in the world" (A. 13). Petitioner willingly surrendered his right to receive a more formal verdict

[5] Compare *United States* v. *Howard,* 432 F. 2d 1188 (C.A. 9), and *Greene* v. *Massey,* 546 F. 2d 51 (C.A. 5), which discuss and apply this rule, with *United States* v. *Wiley,* 517 F.2d 1212 (C.A.D.C.), which holds, in the exercise of the powers conferred on appellate courts by 28 U.S.C. 2106, that after a conviction is reversed because the evidence is insufficient a second trial should not be held unless the insufficiency is attributable to causes beyond the control of the prosecution.

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from the factfinder in his first trial. If the trial had gone to verdict, it would have been necessaary to set that verdict aside, and a second trial could have been held. We discuss these considerations below in greater detail.

B. PETITIONER'S MOTION TO DISMISS THE INFORMATION REMOVED ANY BAR TO A SECOND TRIAL

1. In the absence of judicial or prosecutorial overreaching, a motion for a mistrial removes any double jeopardy objection to a second trial

"[W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *United States* v. *Jorn, supra,* 400 U.S. at 485. This principle follows from the rule that, if the trial had gone to completion and a conviction had been reversed on appeal, a second trial could have been held. There is no point in requiring a defendant to endure the remainder of a trial that already (in his opinion) is so infected with error that a reversal and a second trial are bound to follow. Yet, unless a second trial were permitted after a mid-trial termination at the request of the accused, district courts would tend "to reject the most meritorious mistrial motion in the absence of manifest necessity and to require, instead, that the trial proceed to its conclusion despite a legitimate claim of seriously prejudicial error." *United States* v *Dinitz, supra,* 424 U.S. at 610; footnote omitted.

The "important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error." *Id.* at 609 (footnote omitted). If the defendant, for reasons he deems sufficient, asks to terminate the proceedings without receiving the verdict of the factfinder, the Double Jeopardy Clause does not prohibit a second trial.[6]

Petitioner surrendered his valued right to receive the verdict of the factfinder. After the trial had begun and the prosecutor had made his opening statement, petitioner's counsel made an oral motion to dismiss the information; when the trial judge rebuked counsel for making the motion so belatedly, counsel did not ask for a continuance to allow the judge to do legal

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[6] We use "factfinder" throughout this brief to refer to the jury in a jury trial and to the judge in a bench trial. The double jeopardy considerations are similar, since "the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials" (*United States* v. *Jenkins, supra,* 420 U.S. at 365). The only difference is that the judge in a bench trial resolves questions of both law and fact, whereas in a jury trial only the jury may resolve factual disputes. *Singer* v. *United States,* 380 U.S. 24. Because issues of fact resolved in favor of an accused may not be reexamined in a second trial (*Ashe* v. *Swenson,* 397 U.S. 436), it sometimes may be necessary in bench trial cases to determine whether the judge has acted in his capacity as factfinder or only in his capacity as the resolver of legal disputes. There is no need to make that inquiry here, however, because it is clear that the judge in petitioner's first trial did not purport to resolve any disputed factual issues in petitioner's favor, and the second trial did not call into question any disputed issues that previously had been resolved against the prosecution.

research before beginning to hear evidence; when the trial judge announced later during the trial that he was ready to rule on the motion to dismiss the indictment, counsel did not ask the judge to defer ruling until after a verdict had been rendered.[7] Petitioner's counsel showed not the slightest interest in receiving the verdict of the factfinder—which was understandable in light of the trial judge's emphatic and unequivocal statement that petitioner was guilty "beyond any reasonable doubt in the world" (A. 13). Petitioner was not deprived at the first trial of his interest in receiving a verdict or of any other interest protected by the Double Jeopardy Clause.[8]

[7] Unless, as in *United States* v. *Jorn*, *supra*, the trial court's action is so precipitate that it is impossible to protest, the defendant's failure to object to a termination of his trial should be treated as consent. *United States* v. *Goldstein*, 479 F. 2d 1061, 1066–1068 (C.A. 2); *Roberts* v. *United States*, 477 F. 2d 544, 545–546 (C.A. 8); *United States* v. *Pappas*, 445 F. 2d 1194, 1199–1200 (C.A. 3); *Scott* v. *United States*, 202 F. 2d 354, 355–356 (C.A.D.C.), certiorari denied, 344 U.S. 879; *Conner* v. *Deramus*, 374 F. Supp. 504, 507–509 (M.D. Pa.); but see *Galloway* v. *Beto*, 421 F. 2d 284, 288 n. 4 (C.A. 5), certiorari denied, 400 U.S. 912; *Himmelfarb* v. *United States*, 175 F. 2d 924, 931 n. 1 (C.A. 9), certiorari denied, 338 U.S. 860. Compare *United States* v. *Grasso*, C.A. 2, No. 76–1284, decided March 9, 1977, slip op. 2250–2251 (defendant implicitly objected to the declaration of a mistrial), with *id.* at 2263–2264 (dissent) (explicit objection is necessary, or consent to mistrial will be inferred).

[8] Indeed, once the district court had announced that petitioner is guilty beyond a reasonable doubt, its decision to dismiss the information was functionally the same as a decision to arrest judgment under Fed. R. Crim. P. 34. An order dismissing an information after verdict because of facial insufficiency would have been subject to appellate review under both the old Criminal Appeals Act (*United States* v. *Sisson*, 399 U.S. 267, 280–290) and the present one (*United States* v. *Wilson*, *supra*). If the order arresting judgment had been erroneous, the court of appeals could have reversed and remanded with instructions to enter judgment of conviction on the verdict. If, on the other hand, judgment had been properly arrested, a second trial could have been held (just as if the judgment of conviction had been reversed on appeal). See *United States* v. *Tateo*, *supra*, 377 U.S. at 465 (the Double Jeopardy Clause "does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction"). Only the fact that the district court made its pronouncement of guilt before allowing closing argument makes this a mid-trial termination. In almost every other respect, however, it shares the attributes of a post-verdict arrest of judgment.

2. The same principles that apply to requests by the accused for mistrials also permit retrials after the accused has requested any other form of mid-trial termination

a. Function, not form, determines whether a second trial is permitted

It might be argued that the principle discussed in *Dinitz* does not apply when the first trial is ended by an order dismissing the indictment rather than by an order declaring a mistrial. We submit, however, that it makes no difference, for double jeopardy purposes, what form of mid-trial termination a defendant seeks. A "mistrial," a "dismissal of the indictment," or an "acquittal" by a judge in a jury trial all are based upon a perceived legal error in the institution or continuation of the proceedings rather than upon the resolution by the factfinder of any disputed fact in favor of the accused. A second trial therefore would not offer the prosecution the chance to do better with a second factfinder than it did with the first.

This Court has held on many occasions that function, not nomenclature, controls when double jeopardy interests are at stake. *United States* v. *Sisson,* 399 U.S. 267, 270, 279 n. 7; *United States* v. *Wilson, supra,* 420 U.S. at 335–339, 347–351; *Serfass* v. *United States, supra,* 420 U.S. at 392; *Breed* v. *Jones, supra,* 421 U.S. at 529. For purposes of the various policies that are to be served in the interpretation and application of the Double Jeopardy Clause, it makes no material difference what the name of or reason for the mid-trial termination may be. Thus, the permissibility of a retrial following a mid-trial dismissal should be assessed by the same standards that apply in the case of a termination by mistrial.

b. The interests of the accused in avoiding a second trial are the same whether the first trial ends in a mistrial or in an order dismissing the information

No matter why the first trial has ended, the most important fact relating to the permissibility of a second trial is that the accused has not received the verdict, on the facts, of the factfinder. When the accused has actively sought the mid-trial termination, however, he has—for reasons he persumably deems sufficient—abandoned his valued right to receive the verdict of the factfinder. This is so whether he seeks a mistrial or an order dismissing the indictment.[9] After

[9] We believe that the considerations discussed in this brief support a rule allowing second trials even when the district court has "acquitted" the defendant, in a jury trial, for reasons that go to the general issue of guilt or innocence. This case does not involve an "acquittal" on the merits, however, but instead concerns only an order dismissing the information as defective on its face. The Court therefore need not decide whether an "acquittal" on the merits—a decision that the accused is not criminally responsible—may be followed by a second trial when the "acquittal" is not embodied in a verdict by the factfinder. That issue is presented in the pending petition in *New York* v. *Brown*, No. 76–358.

all, the accused's request to terminate the trial expresses his willingness to forego receipt of a verdict. And there is no pressure on the accused to seek relief prior to verdict because—here, as in most such cases—he has the option to go to verdict and preserve his objections for post-verdict determination if he is not acquitted by the factfinder (see pages 24–25, *infra*).

As the Court explained in *United States* v. *Dinitz, supra,* 424 U.S. at 608, "when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." This is so when the defendant seeks to dismiss the indictment because of legal error no less than when he seeks a mistrial because of legal error. A defendant who concludes that his interests are best served by taking the case from the factfinder (and thereby avoiding any risk that he will be found guilty at that trial) should not later be

heard to complain when the prosecution makes a second effort to hold an error-free trial.

This focus upon the defendant's abandonment of his right to go to verdict at the first trial involves no diminution of the major protection afforded by the Double Jeopardy Clause—ensuring the interest of the accused in the finality of verdicts in his favor by the factfinder. See *United States* v. *Jenkins, supra.* An aborted trial produces no verdict of the factfinder in which the accused has an interest; it finds no disputed fact in favor of the accused; whatever the reason for a mid-trial termination, accordingly, it does not implicate the defendant's interest in the finality of a favorable verdict.[10]

c. A rule that distinguished among the reasons for the mid-trial termination would be inconsistent with the rule allowing a second trial after a verdict of guilty has been set aside

An important consideration, one stressed in *United States* v. *Jorn, supra,* is the fact that the goverment

[10] Many commentators have suggested that the guarantee that facts found in favor of the accused will not be subject to re-examination is the central meaning of the Double Jeopardy Clause, and that second trials therefore should be allowed when they would not produce a risk of depriving the accused of favorable factual findings. See Note, *Twice in Jeopardy*, 75 Yale L.J. 262 (1965); Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 Harv. L. Rev. 1822 (1974); Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960). Other scholars, although not according such a central position to the protection of facts found in favor of the accused, have concluded that second trials should be permitted after mid-trial terminations, whatever the reason for the terminations. See Friedland, *Double Jeopardy* 69–72 (1969); Sigler, *Double Jeopardy* (1969).

cannot reasonably be required to marshal its resources to guarantee to every accused a single error-free proceeding on pain of inability to convict those guilty of crime. Errors are inevitable in the criminal process. Not all trials will go smoothly; not all informations or indictments will be drafted correctly. There is no reason why a drafting error should confer immunity from prosecution on all defendants prescient enough to wait until trial has begun to point out the error.[11]

It would be a topsy-turvy rule if the constitutionality of a second trial could be saved by the congruence of *two* errors. We agree with petitioner that the information was improperly drafted.[12] Yet if the district judge in the first trial had erred and rejected

[11] If the motion is made before trial, the court can pass upon the sufficiency of the indictment prior to the attachment of jeopardy. If the indictment is insufficient, the defendant can be reindicted. If a sufficient indictment is improperly dismissed, the government may obtain appellate review. *Serfass* v. *United States, supra.* In either event, only a single trial will be necessary. The problem presented by the mid-trial dismissal in this case never would have arisen if petitioner's counsel had drawn the defect in the information to the court's attention before trial.

[12] The Assimilative Crimes Act, under which petitioner was prosecuted, establishes "complete current conformity with the criminal laws of the respective States in which * * * [federal] enclaves are situated." *United States* v. *Sharpnack*, 355 U.S. 286, 293. Under Indiana law, the indictment or information charging a violation of Indiana Code 35–17–5–3, Burns Ind. Stat. Ann. 10–3030 (1975), must state that the defendant knowingly committed the theft with intent to deprive the victim of his property. *Linnemeier* v. *State*, 330 N.E. 2d 373, 376 (Ind. Ct. of App.); *Martin* v. *State*, 300 N.E. 2d 128, 131 (Ind. Ct. of App.); *Monroe* v. *State*, 339 N.E. 2d 102 (Ind. Ct. of App.). The information therefore should have alleged that petitioner committed the theft knowingly and with the intent to deprive Bilskie of his property permanently. *United States* v. *Debrow*, 346 U.S. 374, 376.

petitioner's challenge to the sufficiency of the information, petitioner could have been tried a second time after the error had been corrected on appeal (or by the district court after verdict). Petitioner's argument is that, because the district court ruled correctly and dismissed the information in his case, he cannot be retried, but that if the court had erred and denied the motion to dismiss he could have been retried. To state the proposition is to demonstrate its fallacy.

A defendant should not be allowed to transmute a drafting error into immunity from prosecution by the simple act of delaying, until trial has begun, the making of a motion to dismiss an indictment. The Double Jeopardy Clause is not a sword for defeating altogether the public interest in obtaining a trial of those accused of criminal misconduct. Accordingly, an accused who moves in mid-trial to dismiss the indictment, or to terminate the prosecution for any other reason, should be subject to a second trial if the termination is erroneous or if, as here, the error can be cured.[13]

[13] Several courts of appeals have agreed with this approach and have allowed second trials after mid-trial terminations at the request of the accused. These courts have held that it makes no difference whether the terminations are called mistrials or orders dismissing the indictments. See *United States* v. *Sanabria*, 548 F. 2d 1 (C.A. 1), petition for a writ of certiorari pending, No. 76–1040; *United States* v. *Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909 (emphasizing the argument that an accused should not be allowed to obtain a tactical advantage by delaying a motion to dismiss until jeopardy has attached); *United States* v. *DiSilvio*, 520 F. 2d 247 (C.A. 3), certiorari denied, 423 U.S. 115 (holding that as a rule a motion in mid-trial to dismiss the indictment precludes any objection to a second trial). See also *United States* v. *Sedgwick*, 345 A. 2d 465 (D.C. App.), certiorari denied, 425 U.S. 966.

Other courts, however, have adopted a rule under which mid-trial terminations called "acquittals" or "dismissals of the indictment" prohibit second trials, but terminations called "mistrials" do not. See *United States* v. *Scott*, 544 F. 2d 903 (C.A. 6) (order dismissing the indictment because of preaccusation delay); *United States* v. *Lucido*, 517 F. 2d 1 (C.A. 6) (order terminating the prosecution in light of mid-trial suppression of critical evidence); *United States* v. *Means*, 513 F. 2d 1329 (C.A. 8) (order terminating the prosecution because of alleged prosecutorial misconduct and unwillingness to consent to 11-member jury); *United States* v. *Robbins*, 510 F. 2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048 (order dismissing the indictment because the statute is unconstitutional as applied); cf. *United States* v. *Grasso*, *supra* (the Double Jeopardy Clause bars a second trial after judge terminated first trial by declaring a mistrial rather than by proceeding with the trial or granting defendant's motion for acquittal, where the defendant was not entitled to either acquittal or mistrial). For the reasons given in the text, we submit that these cases were wrongly decided.

The interests of defendants, no less than the interests of the public, are best served by a rule allowing second trials after the first trial has been terminated at the request of the accused. The Court pointed out in *United States* v. *Tateo, supra,* 377 U.S. at 466, that "it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." That consideration is pertinent to mid-trial

requests to dismiss the indictment no less than to requests to an appellate court to reverse a conviction. It is doubtful that a trial court would look as favorably as it should upon a defendant's request to terminate his trial if the judge knew that granting such a request would irrevocably end the prosecution. The judge would, instead, tend to proceed with the trial and leave the correction of errors to post-verdict proceedings or to appellate tribunals, after which second trials could be held. It would be ironic if the only way to comply with the Double Jeopardy Clause—which was designed to prevent repetitious litigation—were for district courts to hold or complete useless trials that could not end in valid verdicts. A trial judge should not be put in the quandary of holding what he and the accused agree is a useless trial in order to safeguard society's interest in prosecuting those accused of crime.

d. A defendant may safeguard his legitimate interests by going to verdict and saving his objections for post-verdict resolution

The rule that a defendant who does not object to a pre-verdict termination of his first trial should not be able to block a retrial on double jeopardy grounds does not impair the defendant's "valued right" to go to verdict at the first trial, and it does not subject his choice to pressure of any sort. Far from it; a defendant who desires to obtain the jury's verdict may do so simply by asking the judge to postpone his legal ruling until after verdict, thereby receiving an acquittal by the factfinder (if one is forthcoming).

This strategy will safeguard all of the defendant's interests. If he should be found guilty by the factfinder, he would be entitled to a post-verdict ruling on his claim of legal error—in the instant case, by means of a motion for arrest of judgment pursuant to Fed. R. Crim. P. 34. If there is error, the verdict would be set aside and a new trial would be held. If the defendant's assertion of error were incorrect, the district court (or an appellate court) would reject it, and the verdict would stand. If the assertion of error were incorrect, but the district court nevertheless found error, the court of appeals could rectify the district court's mistake without the need for holding a second trial. Following *Wilson, Jenkins,* and *Serfass,* many courts have reversed erroneous rulings in favor of defendants and reinstated verdicts of guilty.[14]

Saving legal issues for post-verdict decision preserves the accused's right to receive an acquittal by the factfinder at a single trial; it also minimizes his exposure to multiple trials by eliminating any significant chance that a retrial might be required by erroneous mid-trial terminations. If, disdaining the opportunity to receive the verdict of the factfinder, the accused seeks and receives a mid-trial termination, it is not unfair to hold a second trial.

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[14] See, *e.g.*, *United States* v. *Donahue*, 539 F. 2d 1131 (C.A. 8); *United States* v. *Burroughs*, 537 F. 2d 1156 (C.A. 4); *United States* v. *Cravero*, 530 F.2d 666 (C.A.5); *United States* v. *DeGarces*, 518 F. 2d 1156 (C.A. 2). Cf. *United States* v. *Finch*, C.A. 9, No. 75-2149, decided December 22, 1976 (reversing an "acquittal" after trial on stipulated facts).

In sum, neither the label of nor the reason for the order terminating the first trial prior to verdict should control the permissibility of a second trial under the Double Jeopardy Clause.[15] The expense, trauma and humiliation of the second trial are the same no matter why the first trial ended before verdict. The reason why the first trial ended may show that a second trial should not be held (if, for example, the statute is unconstitutional or does not apply to the conduct the accused is alleged to have committed, or if the judge correctly determines that the evidence cannot support a conviction), but those reasons are not based upon the Double Jeopardy Clause.[16]

[15] In England, the reason why the first trial ended is immaterial. Jeopardy does not "attach" until the jury returns a verdict, and second trials routinely are allowed after mid-trial terminations. See Friedland, *Double Jeopardy* 21–38 (1969). While serving other double jeopardy values, the English approach affords a defendant no protection of his interest in receiving the verdict of—and possible exoneration by—the factfinder at the first trial.

[16] We believe that this is what the Court was discussing in *United States* v. *Jenkins*, *supra*, 420 U.S. at 365 n. 7, which observed that it is important whether proceedings in the trial court terminate in a mistrial or in the defendant's favor. A "mistrial" usually is granted in contemplation of reprosecution. In *Jenkins*, on the other hand, the trial ended in a ruling on the general issue by the factfinder. The Court could not determine whether the factfinder had resolved certain factual issues against the defendant, and the judgment in that case therefore operated, in effect, as an absolute acquittal. The factfinder's judgment may have absolved the accused from criminal responsibility, and he had an interest in preserving the finality of that resolution. A trial that is aborted before verdict, however, does not entail any factual finding absolving the accused of criminal responsibility.

Petitioner's counsel asked for an order dismissing the information, and he received the relief he sought. That is enough to demonstrate that a second trial, on a proper charge, should be permitted. "Here, as in the mistrial context, [petitioner] elected to forego his valuable right to have his trial * * * concluded by the first tribunal. * * * [Petitioner] has not made, nor can he make, any suggestion that the government intentionally manipulated events to gain some advantage at the first trial or to force [petitioner] to forego his right to proceed before the first tribunal. * * * Since [petitioner] voluntarily requested termination of proceedings * * *, and since there can be no suggestion that [petitioner's] request was attributable to developments resulting from prosecutorial or judicial overreaching, * * * there is no double jeopardy bar to a [second] prosecution on this cause." *United States* v. *Sanabria*, 548 F. 2d 1, 7–8 (C.A. 1), petition for a writ of certiorari pending, No. 76–1040.

C. IT IS NOT DISPOSITIVE THAT THE DISTRICT COURT HEARD EVIDENCE AT THE FIRST TRIAL BEFORE DISMISSING THE INFORMATION

As should be clear from the foregoing discussion, we believe that the presence or absence of an objection by the defense to any pre-verdict termination of a trial is the critical factor in determining whether a second trial may be held. If the defense, having been afforded reasonable opportunity to do so, does not ask to receive the verdict of the tribunal then empaneled,

then it cannot reasonably be found that the defendant was deprived of his "valued right" to that verdict, a deprivation that would be the sole reason in logic or policy for precluding a second trial.

This approach by and large eliminates any reliance, in this case, upon the doctrine of "manifest necessity" that was the foundation for this Court's decision in *Illinois* v. *Somerville, supra.* The "manifest necessity" rule does not come into play unless the trial judge has overridden the defendant's preference for the tribunal then sitting; only a decision to terminate a trial despite the accused's desire to go to verdict must be justified by "manifest necessity." But petitioner did not assert such a desire, and his wishes were not disregarded.

Under the approach we have taken, application of the "manifest necessity" standard must reflect a sensitive regard for the factors that bear upon the fairness of depriving the defendant of his chance to terminate the contest by an acquittal at the first trial. In the hung jury cases, for example, manifest necessity is established because there is no reasonable possibility that the jury, being irrevocably deadlocked, would acquit the defendant. In other cases, where it cannot confidently be said that no verdict of acquittal is forthcoming, the courts must inquire into the availability of alternative means to purge the taint of the events precipitating the consideration of a mistrial. We think the inquiry also should encompass such factors as the degree to which actions of

the defense have brought about the crisis and the stage of trial at which the termination is being considered. See *United States* v. *Gentile,* 525 F. 2d 252, 255–258 (C.A. 2), certiorari denied, 425 U.S. 903.[17]

Illinois v. *Somerville, supra,* can be analyzed in these terms. Here, as in *Somerville,* a trial was terminated before verdict because of a defect on the face of the charge that made a valid conviction impossible. The trial in *Somerville* was terminated before any evidence had been taken. The termination took place over the defendant's objection, but the Court concluded that it was manifestly necessary to abort the trial because the "ends of public justice" (410 U.S. at 463) dictate that the parties to a criminal case and the courts need not be burdened by mounting a full trial that could not end in a valid judgment of conviction. We believe that it would make no difference whether the termination before verdict were called a mistrial (as in *Somerville*)

[17] For example, if a mistrial appears to be necessary because the defense has engaged in questionable conduct that has materially prejudiced the prosecution's prospect of obtaining a fair and impartial verdict, it obviously would not be improper to terminate the first trial whether or not the defendant objected to the termination. And a pre-verdict termination that occurs early in the trial (as in *United States* v. *Dinitz, supra,* and *Illinois* v. *Somerville, supra*) would constitute a less grave impairment of the defendant's "valued right" than would a termination at the close of the evidence following a three-month trial. Of course, a mistrial declared even at the very beginning of a trial may bar a second trial when, as in *Downum* v. *United States,* 372 U.S. 734, it is done to avoid a likely acquittal.

or an order dismissing the indictment (as in the present case). In either event the trial ended with the expectation that the defect in the charge would be corrected; a mistrial and an order dismissing the indictment are, in these circumstances, functionally equivalent, and it would be wholly insupportable to reach a different result because of the label the trial court placed upon its action. See, *e.g., United States* v. *Sisson, supra,* 399 U.S. at 270, 279 n. 7; *Serfass* v. *United States, supra,* 420 U.S. at 390–392.

Manifest necessity therefore would have supported the termination of petitioner's first trial—even over his objection—early in the trial. But once the evidence has been taken, there is little to weigh against the interest of a protesting defendant in receiving the verdict of the factfinder and, perhaps, being acquitted on the spot. There was manifest necessity in *Somerville* to avoid holding a useless trial; there would not, we believe, be manifest necessity to prevent a defendant from receiving a verdict once all of the evidence has been heard."[18]

[18] *Somerville* distinguished (410 U.S. at 464–465) *Downum* v. *United States*, 372 U.S. 734, upon which petitioner relies (Br. 17). *Downum* does not help petitioner. In *Downum* the prosecutor allowed jeopardy to attach on six counts of an indictment, knowing that a witness critical to two of the counts would not be present. The prosecutor then successfully obtained a mistrial with respect to all six counts, including the four counts for which no witness was missing. The Court held that this mistrial was not justified by manifest necessity. In the present case, however, the prosecutor did not allow jeopardy to attach although knowing of a flaw; unlike the case in *Downum*, there is here no prosecutorial overreaching. Nor did the prosecutor in the present case seek the termination of a trial on counts that were not infected with error.

It does not follow from this analysis, however, that petitioner's second trial violated the Double Jeopardy Clause because it was terminated after all of the evidence had been received.[19] Petitioner's trial was not terminated over his objection. In our view the complete answer to petitioner's arguments is that he had a right at the first trial to insist upon receiving a verdict after all of the evidence had been heard. He could have been acquitted, if the tribunal had been so disposed.[20] Petitioner's willingness to forego receiving the verdict of the factfinder justifies his second trial.

The district court's action in hearing evidence in petitioner's case was entirely reasonable. Petitioner did not object either to the taking of evidence or to the termination before formal verdict. The trial was underway. The prosecutor had made his opening statement. Although jeopardy technically had not "attached" because no evidence had been heard,[21] it would have been poor judicial administration for the judge to have stopped the trial in its tracks, *sua sponte,* while he researched a belated oral motion by defense counsel.

[19] Petitioner apparently agrees with much of the analysis we have presented above (Br. 22 n. 35).

[20] Indeed, it seems likely that the district court, were it disposed to acquit petitioner, would have terminated the trial—and the entire controversy—by a verdict of "not guilty" rather than by dismissing the information. It is plain from the record, however, that the court was not the least disposed to acquit petitioner (see A. 13).

[21] See *Serfass* v. *United States*, *supra*, 420 U.S. at 388; *Wade* v. *Hunter*, *supra*, 336 U.S. at 688.

The delay in ruling upon petitioner's motion to dismiss the information was caused primarily by the delay of petitioner's counsel in making the motion. It is one thing to say that a written motion made well in advance of trial should be passed upon before jeopardy attaches; it is quite another to say that a district court has an obligation to rule at once upon oral motions made in the course of trial. Motions to dismiss the indictment or information sometimes require substantial research and study; the trial judge in petitioner's first trial could not have known whether lengthy study would be needed here until he had halted the trial and looked at the state case that had been cited to him.

Petitioner has not offered any reason for his tardiness in making the motion. His counsel had been appointed approximately two months before trial, yet he did not make the motion to dismiss until the trial was under way. Moreover, counsel did not ask for a continuance of the trial and did not voice any objection to the taking of evidence. It is now too late for petitioner to argue that this taking of evidence—to which counsel did not object—was an error that bars the holding of a second trial. Petitioner's objection or request for a continuance would have offered the district court the opportunity to avert any of the hardship of which petitioner now complains. His failure to make this simple motion must be taken as acquiescence in the hearing of evidence until a convenient recess would allow the trial judge to do some brief research. Cf. *Francis* v. *Henderson*, 425 U.S. 536; *Estelle* v. *Williams*, 425 U.S. 501; *Davis* v. *United States*, 411 U.S. 233.

Petitioner's response to these arguments is twofold. First, he contends, an objection or request for a continuance would have been futile (Br. 23). Second, he argues, the district court should have ordered a recess *sua sponte* (Br. 20–23 and n. 34).

The argument that an objection or request for a continuance would have been futile is nothing but speculation. Cf. *Estelle* v. *Williams, supra.* Although the trial judge had tentatively denied the motion to dismiss the information, subject to further research (A. 9), the judge had not indicated unwillingness to halt the trial and do the research immediately. He was simply never asked to halt the trial, and therefore he never had an opportunity to express his views on the matter.

Petitioner's argument that the court should have interrupted the trial *sua sponte* fares no better. Every interruption of an ongoing trial subjects witnesses and the parties to inconvenience and delay. The witnesses in this case were in court waiting to testify, the prosecutor had made his opening statement, and for all the trial judge knew research on the motion would have been complicated and lengthy. Petitioner contends that this is not so, that it should have been evident that the information was defective. But if the information was patently defective, why did petitioner's counsel wait so long to make the motion to dismiss? If it must be assumed that the deficiency could be seen without the need for research, then it

also must be assumed that counsel delayed making the motion to dismiss in the hope that jeopardy would attach before the trial judge realized that the information was defective. And if this case is treated as one in which counsel delayed for the purpose of turning the shield of the Double Jeopardy Clause into a sword, then petitioner is in no position to argue that the trial judge made a fatal error by not dismissing the information at once or interrupting the trial to do research.[22]

The district court's decision to hear the evidence at petitioner's first trial cannot be characterized as judicial overreaching. It did not deprive petitioner of an opportunity to receive the verdict of the factfinder. Quite the contrary, evidence was received and, if the prosecution's case had been insufficient, the trial would have ended in an acquittal, on the facts, by the finder

[22] Petitioner also argues (Br. 20–21, 23–27) that the failure of the prosecutor to amend the information after its defect was called to his attention differentiates this case from *Somerville*. Petitioner, however, never asked for an amendment; he sought only outright dismissal. If petitioner had raised his objection to the information before trial, amendment would have been a simple matter. But the fact that the objection was made during the trial deprived the prosecutor of the opportunity to do research and recognize his error, just as it deprived the district court of the opportunity to do research. Although it doubtless would have been better practice to have amended the information once the trial judge had concluded that it was defective (see Fed. R. Crim. P. 7(e)), the prosecutor's failure to suggest this course, in the absence of a request by petitioner, violated neither the Double Jeopardy Clause nor the Due Process Clause. In light of the trial judge's belief (A. 13) that the prosecution had proved guilt beyond a reasonable doubt, the prosecutor's neglect to amend the information was much more harmful to the prosecution than it was to petitioner.

of facts. There was no unreasonable delay in passing on the motion; the entire trial took less than two hours, and the court passed upon petitioner's motion promptly after the first recess had given it the opportunity to do some research.

What happened at petitioner's first trial was certainly no worse than if the trial judge had erroneously adhered to his initial denial of the motion to dismiss the indictment. If the judge had erred, he would have entered a verdict, and the conviction would have been reversed on appeal. There still would have been two trials—but, in the interim between verdict and reversal, petitioner would have stood as a convicted man. It is hard to see how petitioner was harmed by the fact that the trial judge followed the correct course and dismissed the information.

Petitioner's final argument is that the district court should not have given the prosecution a full opportunity to see how the case would go and to improve upon its performance at a second trial (Br. 10–11). The prosecution would have had the same opportunity, however, if the district court erroneously had denied the motion to dismiss and the case had been reversed on appeal. Since the first trial could not have ended in a valid conviction, the district court's decision to take evidence effectively offered petitioner two chances to be acquitted while exposing him to only one risk of conviction. See *Ludwig* v. *Massachusetts*, 427 U.S. 618, 630–632, which upholds against a double jeopardy argument the Massachusetts system under which an accused may obtain a jury trial only by

standing trial twice. There, as here, the dual trial offered the accused a full preview of the prosecution's case and two chances to be acquitted.[23]

Moreover, if this concern were a genuine one in this case and not an afterthought, petitioner presumably would have objected to proceeding with a trial he knew could not result in a valid conviction. Whatever hardship petitioner might have experienced in standing trial twice is directly attributable to his untimeliness in making the motion to dismiss the information. But any hardship was not sufficiently weighty to persuade his counsel to move for a continuance or to object to the taking of evidence, and petitioner's interests here must accordingly be "subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter, supra,* 336 U.S. at 689. The Double Jeopardy Clause did not prohibit petitioner's second trial.[24]

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[23] The present case would perhaps be more difficult if the trial judge's delay in passing upon the motion to dismiss unnecessarily had afforded the prosecution a preview of petitioner's evidence. But petitioner presented no evidence at either trial, and the objections to a preview by the prosecution (which would be based largely on the Due Process Clause rather than the Double Jeopardy Clause) therefore are not presented here.

[24] Petitioner also contends (Br. 25–27) that his second trial violated the Due Process Clause. This adds nothing to the double jeopardy arguments. Multiple trials are held routinely in civil litigation (see, *e.g.*, *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243), and it has never been thought that multiple trials are themselves offensive to anything in the Due Process Clause. Unless multiple trials are staged for the purpose of harassment, a circumstance lacking here, they do not violate the Due Process Clause. Cf. *North Carolina* v. *Pearce, supra; Allee* v. *Medrano*, 416 U.S. 802.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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